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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-1239

NORMA M. BARDEN,

Petitioner,

vs.

JUNIOR COLLEGE DISTRICT NO. 520 OF THE STATE OF ILLINOIS; RALPH E. FRANCIS ET AL as MEMBERS OF THE BOARD OF JUNIOR COLLEGE DISTRICT NO. 520, STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To: *The Honorable Chief Justice And The Associate Justices Of The United States Supreme Court*:

Petitioner, Norma M. Barden, respectfully prays that the Court issue a Writ of Certiorari to review a judgment of the Supreme Court of Illinois denied leave to Petitioner to appeal from the Order of the Appellate Court of Illinois, Third District, entered July 13, 1971 whereby said Court affirmed the Order of the Circuit Court of Kankakee, Illinois denying Petitioner the right to a Common Law Writ of Certiorari to Junior College District No. 520 of the State of Illinois et al which had discharged her as a teacher, contrary to the provisions of her contract.

REFERENCE TO OPINION BELOW.

The opinion of the Appellate Court of Illinois aforesaid is appended hereto. Said case is reported in 271 N.E. 2d 680, 680-681.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked pursuant to title 28 Section 1257 United States Code Annotated.

The judgment of the Supreme Court of Illinois denied leave to appeal as entered on November 29, 1971.

This Court extended the right of Petitioner to file her Petition for Certiorari to and including March 28, 1972 pursuant to title 28 Section 2101.

QUESTIONS PRESENTED.

Whether Petitioner's constitutional rights guaranteed by Article I, Section 2 of the Illinois State Constitution and the 14th Amendment to the United States Constitution have been violated by the taking of property without due process of law and the denial of equal protection of the law?

Whether the Lower and the Appellate Court of Illinois had the right to abolish the Common Law of Certiorari to review the proceedings of the Petitioner's employer, the Board of Junior College, District 520 of the State of Illinois?

ILLINOIS CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE.

Illinois State Constitution: Article I Section 2

DUE PROCESS AND EQUAL PROTECTION

"No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

PERTINENT ILLINOIS STATUTES.

Chapter 28 Ill. R. S.; Common Law

Section 1 Rule of Decision

"That the Common Law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliment made in aid of, and to supply the defects of the Common Law, prior to the fourth year of James the First, * * * and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as a full force until repealed by legislative authority."

Ch. 110 Sec. 265:

"This Act (Administrative Review Act) shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. * * *"

Ch. 122 Sec. 24-11:

"Any teacher who has been employed in any district as a full time teacher for a probationary period

of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period." • • •

Ch. 122 Sec. 24-12:

"• • • The hearing shall be public at the request of either the teacher or the board. The teacher has the privilege of being present at the hearing with counsel and of cross examining witnesses and may offer evidence and witnesses and present defenses to the charges. The board may issue subpoenas, requiring the attendance of witnesses at any hearing and, at the request the teacher against whom a charge is made, shall issue such subpoenas, but it may limit the number of witnesses to be subpoenaed in behalf of the teacher to not more than 10. All testimony at a hearing shall be taken under oath. Any member of the board may administer oaths to witnesses. The board shall cause a record of the proceedings to be kept and shall employ a competent reporter to take stenographic or stenotype notes of all of the testimony. One half of the costs of the reporter's attendance and services at the hearing shall be paid by the board and one half by the teacher. Either party desiring a transcript of the hearing shall pay for the cost thereof." • • •

14TH AMENDMENT TO THE UNITED STATES CONSTITUTION Section I • • •

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Petitioner Norma M. Barden, entered into a written contract with Junior College District No. 520 by which she was engaged for one school year and said contract provided that

> "(e) That the Board may dismiss said faculty member at any time on recommendation of the president of the college for immorality, dishonesty, misconduct in office, incompetency, or wilful neglect of duty, provided that the charges be stated in writing, * * *"

Petitioner was a registered nurse with a Master's degree: three years experience in nursing service; had had experience teaching in a community college: her specialization nursing. He rsalary was $11,770.00 per year. She began August 15, 1969.

On December 10th, 1969 she was given a notice of suspension and later on January 14th, 1970 an unsigned notice of recommendation of dismissal. A purported hearing was held on February 16th, 1970 and the said Board on February 23, 1970 arbitrarily and without Due Process of law ordered that her services be "terminated as of this date for good cause shown". No finding was made that petitioner was guilty of any of the grounds for removal above specified.

On January 19th, 1970 she had been given a written notice that she would be given a hearing, at which time her superior would be asked to elaborate upon

> "* * * reasons for dismissal and that no other person or persons would present any facts supporting said recommendations of dismissal and that the

Board will not hear from any person other than said Dorothy Tayrien and you, Norma Barden; * * *"

Prior to the hearing petitioner served a written request on the defendant president of the said Board for a bill of particulars, complaining that the alleged recommendations were not signed and were general and requesting dates when the alleged crimes took place; who was present; what specific actions constituted the charges; in which respects she was not "well organized"; what warning had been given to petitioner; what records had been made of petitioner's alleged improper conduct and the custodian of said records; in which respects her relationships with students were not satisfactory; what conduct on her part was unacceptable; in what program she was guilty of unacceptable behavior etc. This was not furnished.

After the dismissal above referred to, petitioner prepared a petition for Common Law Certiorari in which she alleged the foregoing matters, including her contract, the above notices etc.

She also alleged that at the time of the hearing she could not make a proper defense for lack of information as to charges; that the Board refused to allow her to have witnesses and to hear testimony of those who knew the truth of the situation; that she was not allowed to have a Court reporter to take the proceedings and the Board threatened to close the hearing if the reporter petitioner had present did not cease to take proceedings and refused to give to petitioner a copy of the proceedings taken by the Board by recorder but stated that the Board would respond with a record only on the Court's order.

That the Board refused to consider petitioner's answer denying the charges and refused to require a reply to said answer.

That the Board refused to have the testimony of Dorothy Tayrien, complaining witness, to be under oath or to have it written or to have an affidavit or certification of its truth made by said witness and refused to allow her to be cross examined by petitioner's counsel, as a result of which refusals she did not tell the truth and slandered petitioner;

That the Board refused to give petitioner a public hearing or to allow the president of the Faculty Association to be present to testify for petitioner and to advise other members of the faculty;

That in making its decision the Board's order took the property of petitioner without Due Process of law by: making a finding without considering the evidence; without making any finding of improper conduct, lack of efficiency or any other ground specified in the charges against petitioner; that no jurisdictional requisites were shown or that evidence was received or that the Board had jurisdiction; that the proceedings of the Board concerned petitioner's property rights and was quasi-judicial, and that there was no other means of review except by common law Writ of Certiorari.

Petitioner prayed for the issuance of the common law Writ of Certiorari.

Respondents objected to the filing of the petition on the ground that petitioner had an adequate remedy at law.

The Court mailed a proposed order denying petitioner the right to file the petition and finding she had no right to certiorari.

Petitioner objected to the order on the grounds that it took petitioner's property without due process of law contrary to the 2d and 19th sections of Article II of the Illinois Constitution and the 14th Amendment to the U. S. Constitution; that the Board was exercising quasi judicial functions and there was no other means of review.

Thereafter on May 18, 1970 the Court entered the order appealed from which denied petitioner leave to file her petition for common law certiorari, and entered the following opinion:

MEMORANDUM OF OPINION

In this case the petitioner has presented a petition requesting that she be allowed to file a petition for issuance of a common law writ of certiorari. At the time the petition was presented the Court took under advisement the propriety of the filing of said petition.

Certiorari is the name of a judicial writ issued by a superior court, directed to an inferior court or other tribunal commanding the latter to certify and return to the former the record of the particular case. The Circuit Courts have the right to award a common law writ of certiorari to an inferior tribunal in cases where the inferior tribunal did not have jurisdiction, where the latter has proceeded illegally, where no appeal is allowed and where no other mode of review of the proceedings is available.

It is the opinion of the Court that the respondents were acting in an administrative capacity when they determined or not to terminate the petitioner's contract. Certainly the board had the right so to do,

as Section 103-42 of Chapter 122 Illinois Revised Statutes give the district the right to employ such personnel as may be needed, to establish policies governing their employment and dismissal, and to fix the amount of their compensation. The Board of Junior College, District Number 520, State of Illinois is a quasi corporation capable of entering into contracts, conducting its own affairs and of suing and being sued. The petitioner, therefore, does have another avenue of relief. She can sue the district for damages.

For the reasons stated, this Court is of the opinion that the petitioner is not entitled under the law to the issuance of a writ of certiorari or even to have leave to file her petition for issuance of such writ.

The Court is of the opinion that the petitioner's petition should be denied.

The Attorney for the District is directed to prepare an order in accordance with this opinion and to submit it to the opposing counsel and to the Court.

Enter: /s/ Herman W. Snow, Judge Dated: May 7, 1970.

Notice by attorney for respondents that he will present an enclosd order as per the memorandum opinion (See R. C82).

In the Notice of Appeal petitioner asked the Court to find that the order of May 18, 1970 denied her due process of law under Sections 2 and 19 of Article II of the Illinois Constitution and the 14th Amendment to the U. S. Constitution.

ARGUMENTS OF REASONS FOR THE ALLOWANCE OF THE WRIT.

THE COMMON LAW OF ENGLAND, PRIOR TO THE 4TH YEAR OF JAMES I OF ENGLAND (1607), WITH CERTAIN EXCEPTIONS NOT RELEVANT HERE, IS IN FULL FORCE AND EFFECT IN ILLINOIS, EXCEPT AS REPEALED BY THE LEGISLATURE. THE RIGHT TO REVIEW THE ORDERS OF INFERIOR TRIBUNALS, EXERCISING QUASI JUDICIAL FUNCTIONS, WHOSE ORDERS CANNOT BE REVIEWED OTHERWISE, WAS ALLOWED AT COMMON LAW IN ENGLAND AND OUR LEGISLATURE HAS NOT ABOLISHED SAID REVIEW IN THIS TYPE OF PROCEEDING.

See Section 1 Chapter 28 Illinois R. S.

See *People* v. *Wilkinson*, 13 Ill. 660 and *Commissioners of Drainage District* v. *Griffith*, 134 Ill. 330, 339.

PETITIONER'S RIGHT TO COMPENSATION UNDER HER CONTRACT WAS A PROPERTY RIGHT AND WHEN THE BOARD ACTED TO DETERMINE WHETHER TO TERMINATE SAID RIGHT IT ACTED QUASI-JUDICIALLY AND SUCH ACTION IS REVIEWABLE UNDER COMMON LAW CERTIORARI.

That petitioner's right to compensation was a property right see *Massie* v. *Cessna*, 239 Ill. 352, 358 and *Mowrey* v. *Mowrey*, 328 Ill. App. 92, 99, 100.

That in the determination of such right the Board acted quasi-judicially see *Commissioners of Drainage District* v. *Griffin*, 134 Ill. 330, 340-41 and *Morgan* v. *U. S.*, 298 U.S. 468, 473, 479-80; 56 S. Ct. 906, 708, 910-11, and on rehearing 304 U.S. 1, 58 S. Ct. 999, 1000.

THE ADMINISTRATIVE REVIEW ACT OF ILLINOIS (CH. 110, SEC. 264 ET SEQ.) DOES NOT PROVIDE FOR REVIEW OF THE PROCEEDINGS HEREIN INVOLVED.

See Section 265 Ch. 110 Illinois Statutes.

There is no act in Illinois creating the right to common law certiorari and there is no act adopting the provisions of the Illinois Administrative Review Act.

IN ILLINOIS UNTIL A TEACHER HAS BEEN EMPLOYED FOR A PROBATIONARY PERIOD OF 2 CONSECUTIVE YEARS, THEY CANNOT ENTER UPON "CONTRACTUAL CONTINUED SERVICE" SO THAT THEY HAVE THE BENEFIT OF THE TEACHER TENURE LAW. PETITIONER WAS IN HER FIRST YEAR AND WAS NOT COVERED BY THE ACT.

See Ch. 122 Sec. 24-11.

See *Anderson* v. *Board of Education*, 390 Ill. 412, and *Wilson* v. *Board of Education*, 394 Ill. 197, 199-200.

Petitioner could not come under the Teacher's Tenure Law because she was in her first year of employment and could not qualify.

TEACHERS UNDER "CONTRACTUAL CONTINUED SERVICE" ARE GIVEN THE RIGHT TO A HEARING BEFORE THEY CAN BE DISMISSED, WHICH HEARING MUST GIVE THEM CERTAIN PROCEDURAL RIGHTS SPECIFIED IN THE TEACHER TENURE ACT (CH. 122, SEC. 24-12).

See Ch. 122 Sec. 24-12 Illinois R. S.

PETITIONER'S CONTRACT WITH JUNIOR COLLEGE DISTRICT 520 GAVE HER THE RIGHT TO A HEARING ON CHARGES WHICH COULD LEAD TO HER DISMISSAL. THIS ENTITLED HER TO THE USUAL INCIDENTS AND PROCEDURES OF FAIRNESS AND JUSTICE AVAILABLE AT HEARINGS. THE POWERS OF STATE AGENCIES IN ILLINOIS ARE LIMITED BY THE 14TH AMENDMENT TO THE U. S. CONSTITUTION.

In *Southern Ry. Co.* v. *Commonwealth of Virginia,* 290 U.S. 190, 196-8, where the order of the State Highway Commissioner ordering the defendant to construct an overhead crossing was in issue, this Court in reversing the Virginia order, held:

> "The claim that the questioned statute was enacted under the police power of the state, and therefore is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that EVERY STATE POWER IS LIMITED BY THE INHIBITIONS OF THE FOURTEENTH AMENDMENT." (Citing many cases). (Emphasis mine).

See *Greene* v. *McElroy,* 360 U.S. 474, 494; *Armstrong* v. *Manzo,* 380 U.S. 545; 85 S. Ct. 1187, 1191, and Webster's famous definition of "Law of the Land"; *Dartmouth College* v. *Woodward,* 4 Wheaton 518, 581.

Certain principles of fairness so that truth can be found are required under the 14th Amendment to the U. S. Constitution and Sections 2 and 19 of Article II of the Illinois Constitution then in effect. Such procedural rights were not given below.

EVEN THOUGH NOTICE OF A HEARING WAS GIVEN, WHEN THE BOARD DID NOT ALLOW MOTIONS, A BILL OF PARTICULARS, A REPORTER, WITNESSES, CROSS EXAMINATION, SUCH WAS NOT THE GIVING OF A HEARING UNDER ILLINOIS DECISIONS AND THE RESULT WAS MERELY THE ARBITRARY EDICT OF THE BOARD WHICH WAS VOID, OF NO EFFECT, ILLEGAL AND IN EXCESS OF THE BOARD'S LEGAL POWERS.

See *People ex rel Joyce* v. *Strassheim, Sheriff,* 242 Ill. 359, 366; 90 N.E. 118. See *Hyslop* v. *Finch,* 99 Ill. 171, 183 where the Court held:

> "The rule is: 'Whenever, in pursuance of law, the property of an individual is to be divested by proceedings aginst his will, there must be strict compliance with all the provisions of the law which are made for his protection and benefit. Those provisions must be regarded as in the nature of conditions precedent which must not only be complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance.' Cooley's Const. Lim. 528." (Citing Illinois cases).

See *Durkin* v. *Hey,* 376 Ill. 292, 300; *In Re Estate of Rackliffe;* 366 Ill. 22, 26; *Burket* v. *Reliance Bank and Trust Co.,* 367 Ill. 196, 202.

In *Greene* v. *McElroy,* 360 U.S. 474, 497; 79 S. Ct. 1400, 1414-15 this Court holds that for 200 years the right of cross examination has been regarded as a vital requirement for ascertaining truth. It was denied here.

TEACHERS ARE DEDICATED PUBLIC SERVANTS CREATING THE QUALITY OF FUTURE CITIZENS. THE PROCEDURAL REQUIREMENTS FOR TEACHERS UNDER "CONTRACTUAL CONTINUED SERVICE" ARE MERELY THOSE REQUIREMENTS WHICH DUE PROCESS OF LAW AND THE LAW OF THE LAND REQUIRE UNDER THE 14TH AMENDMENT TO THE U. S. CONSTITUTION AND ARTICLE II OF THE ILLINOIS CONSTITUTION. CONSTITUTIONALLY, PETITIONER CLAIMS SHE WAS ENTITLED TO THE SAME BASIC PROTECTION AND THE DENIAL THEREOF ENTITLED HER TO HAVE HER PROCEEDINGS REVIEWED BY COMMON LAW CERTIORARI.

In bringing proceedings to dismiss a teacher can it be right for a Board of Education to deny the basic requirements of Due Process to teachers who have not had the opportunity to be on the payroll for two years? If so, a Board can continually act arbitrarily by firing teachers before two years have elapsed so they cannot have "contractual continued service". Petitioner contends she was entitled to basic requirements of proper procedure but was denied this right.

THE FINDINGS OF THE BOARD ARE WHOLLY INADEQUATE AND DID NOT GIVE THE BOARD THE RIGHT TO DISMISS PETITIONER UNDER THE TERMS OF HER CONTRACT WITH THE BOARD. THE REMOVAL "FOR GOOD CAUSE SHOWN" IS NOT SUFFICIENT; SPECIFIC FACTS MUST BE FOUND JUSTIFYING THE DISMISSAL.

See *Funkhouser* v. *Coffin*, 301 Ill. 257, 261-2, where the Court held in a common law certiorari case to a Civil Service Commission in a dismissal of a policeman:

> "It is manifest that the finding that the appellee was guilty as charged is a mere conclusion of law. No fact was stated by which the Court was able to see that conclusion was true. 'A quasi-judicial tribunal of inferior jurisdiction must recite facts, or pre-

> serve the facts themselves, upon which its jurisdiction depends.' *Troxall* v. *Dick*, 216 Ill. 98.)

In *Blunt* v. *Shepardson*, 286 Ill. 84, 88 (cited in the *Funkhouser* case with approval), relative to the revoking of a license of a doctor to practice by the Department of Registration and Education, the Court reversed because the lower court would not issue a common law certiorari and held:

> "The record must be preserved, and it is essential to the validity of an order revoking a license that it shall show the facts essential to the jurisdiction of the department."

Reversed with directions to the court to issue the Certiorari.

The strict requirements of findings under the Administrative Review Act, citing Vol. 2 Davis Administrative Law Treatise, even where no statutory requirement is quoted in *International Harvester Co.* v. *Zoning Board*, 43 Ill. App. 2d 440, 448-9.

The failure to find specific facts renders the Board's order void.

THE COMMON LAW WRIT OF CERTIORARI IS ISSUED WHERE INFERIOR TRIBUNALS ARE SHOWN TO HAVE EXCEEDED THEIR JURISDICTION OR HAVE PROCEEDED ILLEGALLY AND NO APPEAL OR OTHER MODE OF REVIEWING IS GIVEN. THE WRIT COMMANDS THE TRIBUNAL TO CERTIFY THE RECORD TO THE ISSUING COURT THAT THE RECORD MAY BE SEEN TO ASCERTAIN IF THERE WAS JURISDICTION OR THE TRIBUNAL PROCEEDED ILLEGALLY.

See *People ex rel Fosse* v. *Allman*, 329 Ill. App. 296, 299-300. On a hearing of the record, the Court will quash

the Writ if the lower tribunal had jurisdiction and proceeded legally; if it did not have jurisdiction or proceeded illegally, the proceedings will be quashed. *Funkhouser* v. *Coffin*, 301 Ill. 257, 264. The petition shows the Board acted illegally and in excess of its jurisdiction and the Writ should have been issued. The court should reverse and order the lower Court to issue the Writ.

CONCLUSION.

For three hundred years the Courts of general jurisdiction have been awarding and issuing the common law writ of Certiorari in cases similar to this one. The decision sought to be reviewed overturns this important remedy without adequate basis. It is the function of the Legislature to end this procedure if it is to be ended. This decision is wholly unjustified.

This decision affects hundreds of school teachers who have not taught long enough to enter "contractual continued service" and all people subject to administrative hearings not covered by the Administrative Review Act. This is a most important public question that deeply affects the public policy of Illinois and other states as well.

Petitioner contends that basic procedural rights should not be taken from public employees including teachers not in contractual continued service.

Persons appearing before Boards whose decisions cannot be appealed from should have some right to have the record tested to see if the Board had jurisdiction or proceeded in accordance with law. To remove this right is to discriminate against them, which this Court should not permit.

Respectfully submitted,

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APPENDIX

Appellate Court Opinion

BARDEN v. JUNIOR COLLEGE DISTRICT NO. 520

[271 N.E. 2d 680]

SCOTT, Justice.

This is an appeal from an order of the circuit court of Kankakee County, Illinois.

The plaintiff was employed by the defendant junior college as a member of the faculty under a written contract for the period of August 15, 1969, to June 30, 1970. Following a closed meeting of the College Board on February 16, 1970, which the plaintiff attended, her contract of employment was terminated at a public meeting of the Board of the college on February 23, 1970. Plaintiff thereupon filed a petition for issuance of a writ of common law certiorari to the Board of the Junior College District No. 520. The court entered an order denying the petition and from this order the plaintiff appeals.

[1] We need not concern ourselves as to whether the defendant board's action was proper or improper. Nor is it necessary that a determination be made as to whether the defendant board is an inferior tribunal which lacked jurisdiction, exceeded its jurisdiction or proceeded illegally as far as plaintiff is concerned. The trial court was

correct in its finding that a writ of certiorari is not a proper remedy where another adequate remedy is available. *People ex rel. Loomis* v. *Wilkinson,* 13 Ill. 660. The office of the writ is only to bring before the court issuing it the record of the inferior tribunal for review; and it is elementary that the party suing out the writ shall have no other mode of review. *Glennon* v. *Burton,* 144 Ill. 551, 33 N.E. 23. See Vol. 7, I.L.P., Certiorari, § 6, page 172.

[2] The plaintiff has an adequate remedy since she can bring a suit at law for breach of contract, at which time her case can be tried on its merits and if she is so entitled she would be awarded damages. Thus denying plaintiff's petition for writ of certiorari does not leave plaintiff without a means of exercising her rights, and is therefore not inconsistent with due process of law under the Constitution of the United States and the State of Illinois.

It is therefore the opinion of this court that the order of the circuit court of Kankakee County should be affirmed.

ALLOY, P. J., and STOUDER, J., concur.

JUDGMENT OF THE COURT

No. 44665

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Respondent.

ORDER

The petition for leave to appeal is hereby denied.

Dated: November 29, 1971